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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER REX MANUFACTURING COMPANY, INC., et al,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING ON BEHALF OF J. H. RUTTER REX MANUFACTURING COMPANY, INC.,

Respondent

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Respondent

MAY IT PLEASE THE COURT:

PREFACE

This Court's opinion, reversing the judgment of the Court of Appeals for the Fifth Circuit as an unwarranted interference with the Board's remedial power, defers to an administrative agency in a matter relating to its own fault and makes that agency the ultimate judge of itself. In so doing, the Court has not accorded proper

weight to Section 10(f) of the National Labor Relations Act (29 U.S.C. § 160(f)) vesting in the reviewing Court of Appeals the right to modify a remedial order of the Board, and has judicially amended Section 10(c) of the Act (29 U.S.C. §160 (c)) to provide that the Board's remedial order *must* include backpay for the full backpay period in any case involving Board delay.

The opinion of the Court so narrowly construes the power of the reviewing Court of Appeals as to represent a departure from the standard of review defined in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1961), and *NLRB v. Brown*, 380 U.S. 278 (1965). Respondent asks the Court to grant a rehearing and reinstate the judgment of the Court of Appeals for the Fifth Circuit, or alternatively to remand the case to the Board for adequate consideration of the evidence relating to the Board's delay and its effect on the company and the employees. In support of this petition for rehearing, respondent respectfully submits:

1. The opinion of the Court proceeds from an incorrect factual premise in stating that "the Examiner and the Board considered and rejected the company's contention that the delay in issuing the specification should bar the backpay award . . ."[1] The Board did not even permit development of the evidence relating to the delay issue. Nevertheless, the opinion of the Court supports the Board's absolution of itself, makes the Board the final judge of itself in the matter of its own delay, and deprives the reviewing court of the right to modify or set aside in part the order of the Board in spite of the specific authority so to do in Section 10(f) of the Act.

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[1]Pages 3 and 4 of the opinion.

2. The Court has deviated from the standards of review defined in *Universal Camera Corp. v. NLRB* and *in NLRB v. Brown.*

ARGUMENT

1. The opinion of the Court proceeds from an incorrect factual premise, and makes the Board the final judge of its own conduct.

The Court states that the Examiner and the Board considered and rejected the company's contention that the delay in issuing the specification should bar the backpay award in whole or in part. It is respectfully submitted that the Court is in error in stating that the delay factor was fully litigated and adequately considered by the Examiner and the Board. Although the Board advised the Court of Appeals, in order to avoid the issuance of an injunction against the backpay hearing, that it would consider the delay factor in fixing the amount of backpay due, and conceded respondent's right to have the Board's decision reviewed by the Court of Appeals,[2] the Board later changed its position, and its decision and backpay order made no reference whatsoever to the delay factor.[3] Furthermore, in the Trial Examiner's report it was stated that the delay issue was not properly before him and he ruled against the admission of evidence required to fully litigate the issue. The Trial Examiner disposed of the delay issue as follows:[4]

> "These contentions [regarding delay] must be rejected because the record is without the factual

[2]Excerpt from Board's brief in *J. H. Rutter Rex Mfg. Co. v. NLRB*, No. 16422 in the U. S. Court of Appeals for the Fifth Circuit, reproduced on pages 2 and 3 of respondent's supplemental brief to this Court.

[3]R. 3-18.

[4]R. 54 and 55.

> basis upon which such contentions of necessity must be predicated, the Examiner having ultimately ruled (albeit not without first receiving some evidence bearing upon these issues) that none of these issues were properly before him for disposition and, in accordance with this ruling having refused, absent the proffer of evidence of wrongful or unlawful conduct on the part of the General Counsel which was not forthcoming, to permit the parties fully to develop the facts concerning these issues." (Bracket supplied.)

It is patently unreasonable and unfair to permit the Board to avoid the issuance of an injunction against the holding of the delayed hearing by representing to the Court of Appeals that it *will* hear evidence relating to the delay factor, and that it *might* conclude that this factor should be taken into account in defining the backpay period, and then to support the Board in its refusal to permit litigation of the delay issue, particularly when it is an issue relating to the Board's basic obligation to issue an order which is clear on its face, or to promptly clarify an order requiring further definition.[5]

The plain fact of the matter is that the Board has not

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[5]That the order was not clear on its face cannot be subject of further argument since the Court's opinion refers to the fact that of the 207 claimants originally named in the specification, 35 were eliminated by the Board itself, 10 additional claimants were eliminated by the Court of Appeals in a part of its opinion for which review was not sought by the Board. The amount claimed by the Board in the specification was $342,000. This was reduced to approximately $160,000 by the Board after hearing the evidence and further reduced to approximately $130,000 by the Court of Appeals in that part of its opinion for which review has not been sought. Accordingly, the "clear" order of the Board which it says could not be misunderstood, and which it says respondent should have "literally" complied with, without any clarification from the Board, was modified by more than 50% by the Board itself. The monetary obligation created by the Board's remedial order, as modified by the Fifth Circuit in that area for which no review was sought by the Board, is approximately 38% of the amount demanded in the specification filed in 1961.

"considered" its delay in any meaningful way. It has simply ignored it. It refused to hear evidence relating to it. Contrary to its promise to consider delay, it assumed the position that delay is *irrelevant because laches does not run* against the government.[6]

This Court's opinion will be read to mean that a remedial order *must* include backpay,[7] that backpay is *mechanically compelled*,[8] when the Board delays in administering a backpay proceeding. Although Section 10(f) of the Act specifically accords to the reviewing court the right to modify or set aside in whole or in part the order of the Board, the Court's opinion will be read to mean that the Court of Appeals *cannot modify or set aside in part an order of the Board if the Board has been guilty of delay, and that backpay is mandatory when the Board is guilty of delay although it is not mandatory if the Board acts promptly.*[9] The error of the Court, in concluding that the reviewing court is guilty of an unwarranted intrusion into the right of the Board in drafting its order, is compounded when the Court bases its conclusion upon the assumption that the Board adequately considered the delay issue. The record

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[6]This contention is the main thrust of the Board's argument against the modifying order of the Court of Appeals. It is not mentioned in the opinion of this Court.

[7]Although Section 10(f) provides for reinstatement orders "with or without backpay".

[8]Contrary to *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177 (1941).

[9]The opinion of the Court has already been read by the Board to mean that the Board does not have to be concerned about delay in defining a company's obligation under a general order, and may delay indefinitely the filing of a backpay specification. Respondent's counsel is in receipt of a letter dated December 31, 1969 from the Board, printed as Appendix A to this application, which indicates the Board intends to impose backpay liability for the period beyond June, 1961, which was the last quarter covered in the specification filed in November, 1961. If the Board files a new specification it will be filed more than 12 years after the Board order was enforced by the Court of Appeals. The Board evidently considers such action permissible since this Court's opinion did away with the cutoff date imposed by the Court of Appeals and says that the burden of the Board's delay, however long it may be, must be borne by the employer.

shows it simply did not do so. What has happened here is a plain case of administrative abuse without judicial review if this Court deprives the Court of Appeals of the right to act in an area specifically accorded to it by Section 10(f) of the Act.

Respondent concedes that the Board has broad discretionary power in fashioning a remedial order, subject to limited judicial review, as this Court said in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), but when this discretion is exercised by the Board in judging its own faults, the Board is not acting in an area in which it has a special expertise or in which it can be expected to exercise discretion objectively. This case is a classic example of the manner in which an administrative agency "can become a monster which rules with no practical limits on its discretion".[10] The Board has no expertise which makes it better qualified than the Court of Appeals to consider the effect of its delay and decide how, in the face of it, the purpose of the Act can most effectively, reasonably and fairly be served. The Court's opinion states that the order of the Board tends to restore the "economic status quo which would have obtained but for the company's wrongful refusal to reinstate them". But the "economic status quo" should not be considered from the point of view of the employees alone. The company's economic position is prejudiced by the delay in that a greater backpay liability is imposed than would have been imposed if the Board had acted promptly. The Court of Appeals by its modification of the order has attempted to restore the "economic status quo" as that term relates to the company *and* the employees, not the employees alone.

[10] *Burlington Truck Lines Inc. v. U.S.*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962).

The opinion of the Court states that the "Board is not *required* to place the consequence of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers". This language implies that the Court agrees that the Board *might* have decided to do what the Court of Appeals did, namely, adjust the backpay remedy so that the entire burden of the Board's delay would not fall upon one party alone. As was pointed out in oral argument, the Board has itself adjusted backpay periods to exclude time attributable to administrative mistakes.[11] The Court's opinion in the present case deprives the reviewing court of the right to do what the Board could have done in preparing the remedial order. The Board's opinion contains no reason for not doing so. The issue was conveniently ignored. The opinion of this Court permits the Board to act to the prejudice of the respondent without reasons for its action, and without affording respondent an opportunity to develop fully the principle issue in the case.

It is respectfully submitted that the Court is in error, and has acted contrary to its prior holding in *NLRB v. Brown*, in depriving the reviewing court of the right to modify the remedial order of the Board in order to "strike a proper balance" between the conflicting interests of the parties before the Board.

2. The Court deviated from previous standards of review defined by it in *Universal Camera Corp. v. NLRB* and in *NLRB v. Brown*.

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[11]In *NLRB v. Electric Vacuum Cleaner Corp.*, 315 U.S. 685 (1942), the Court refused to *further shorten* a backpay period because the Board had already corrected its administrative error in failing to issue an intermediate report. The remedial order issued by the Board in *Electric Vacuum* excluded a part of the backpay period, which of course penalized the employees in the manner in which the Court says the Fifth Circuit had no right to do. See *Electric Vacuum Cleaner Company, Inc.*, 18 NLRB 591, 636-7, 5 LRRM 429 (1939) for the Board's decision and order.

In *Universal Camera*, Justice Frankfurter said that under the Administrative Procedure Act and the Taft-Hartley Act "the courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past." Justice Frankfurter added that the reviewing courts, including the Courts of Appeals, "are not to abdicate the conventional judicial function." In *NLRB v. Brown* this Court added that:

> "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute . . ." (380 U.S. at 291)

In the *Brown* decision, this Court added that, while "due deference is to be rendered to agency determinations of fact", the reviewing court has a freer hand in making "a judgment as to the proper balance to be struck between conflicting interests." (380 U.S. at 291). The Court of Appeals did not overrule the Board on a question of fact, nor did it modify a Board finding in an area which addresses itself to the expertise of the Board. The Board cannot be said to possess expertise which makes it the fairest, ablest arbiter of the reasons for and the effects of its failure to implement its order, which required further definition. Certainly the Court of Appeals is more qualified to act fairly and reasonably in this area of the case. The opinion of this Court redefines the statutory function of the reviewing court as stated in *Universal Camera* and in *Brown*, and unduly limits that function by depriving the Court of Appeals of the right to strike a balance between the interests of the Board,

of the union, and of the employer.[12] Indeed, the opinion of the Court is certainly not in conformity with the warning of Justice White[13] regarding the need to "make the requirements for administrative action strict and demanding" lest expertise "become a monster which rules with no practical limits on its discretion."[14]

The heavy demands on this Court's time make it difficult to present all of the issues in a large record in a complex case within the time limitations permitted by the summary docket on a writ of certiorari. Respondent urges the Court to consider that the Court of Appeals, in modifying the Board order, acted on an *unusually comprehensive presentation of the issues in briefing and in argument*. Because of the size of the record, the Court of Appeals set no other cases for argument on the day this case was heard and relaxed the time limitations for oral argument. Briefing rules were also relaxed to permit extensive treatment of the delay issue and all of the issues to which it related.[15] The Court of Appeals exercised its reviewing function after a more thorough and comprehensive exposure to the record than was possible under this Court's procedure on its summary docket. In *Universal Camera* this Court stated that its power to review the correctness of the action of the reviewing Court of Appeals ought seldom to be called into action, since the statutory scheme of Congress contemplates that the reviewing function be exercised by the Court of Appeals. The rule of *Universal Camera* has special force when, as in this case, the Court of Appeals had before it an unusually comprehensive presentation of the issues.

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[12]*Deering Millikin, Inc. v. Johnston*, 295 F.2d at 856, 868 (4th Cir. 1961).

[13]*Burlington Truck Lines Inc. v. U.S.*, 371 U.S. 156, (1962).

[14]Id. at 167.

[15]The rules limit briefs to 50 pages. By special order of the court, briefs totalling 592 pages were submitted.

The purpose of the National Labor Relations Act is served by the order in its modified form as enforced by the Court of Appeals. It requires substantial payments of backpay, with interest. Certainly the "reasonableness and fairness of Labor Board decisions", as those terms appear in *Universal Camera*, are brought into question by the Board's handling of the delay issue. Respondent emphasizes again that the Board avoided the issuance of an injunction against the delayed hearing by advising the Court of Appeals that it would consider the delay issue, and then changed its position to the contention that the delay issue was irrelevant. Certainly under the facts here, the Court of Appeals had the right to say it was *not* irrelevant. The Board order was in interlocutory form. It did not clearly define the company's obligation, and was not promptly implemented by the Board, because the Board thought it had no obligation to define its order, and that respondent should comply with it literally, even though the Board itself ultimately excluded over 50% of the amount demanded by the backpay specification.[16]

Furthermore, the Court of Appeals found that the company "was lulled into the belief that the Board was satisfied and that no further action was to be expected". This *possibility* alone brings the "reasonableness and fairness" of the Board's order into question, and presents the delay issue to the Court of Appeals in a context within the traditional scope of judicial review.

The Court of Appeals' function should not be the limited consideration of whether the administrative agency has drafted an order which in the opinion of the agency

[16]The specification obviously reflected the General Counsel's unilateral interpretation of its own order. The interpretation of the Trial Examiner was radically different.

serves the P of the Act under which it functions. There are e which may be considered by the Court. The limited defined by this Court in this case could lead t nistrative abuse if it deprives the reviewing cou e right to consider the reasonableness and fairnes n administrative agency in deciding which of th es before it is to bear the burden of the agency' kes.

CONCLUSION

Responde ectfully prays that the court order a rehearing ment of th sues in this case, and that the judgtively, tha of Appeals be affirmed, or alternacase to th ourt enter an order remanding the respondent nal Labor Relations Board so that ness of a the very least, be accorded the fairministrativ into the causes for the Board's adparties to t and the effect thereof on all of the ion.

espectfully submitted,

(SIGNED) HENRY J. READ

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CERTIFICATE

It is certified that this petition for rehearing is presented in good faith and not for delay.

It is further certified that copies of the foregoing petition for rehearing have been served by mail, upon the following, by depositing the same in a United States mail box, first class airmail postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20530

Jackson & Hess —
Attention Mr. Ralph N. Jackson
1411 Decatur Street
New Orleans, Louisiana 70116

Mr. Jacob Sheinkman
15 Union Square West
New York, New York 10003

Mr. James J. Graham
University of Arizona
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(SIGNED) HENRY J. READ

HENRY J. READ
Counsel for Respondent
J. H. Rutter Rex Manufacturing
Company, Inc.

New Orleans, Louisiana, January 7, 1970.

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
REGION 15
T6024 Federal Building (Loyola)
701 Loyola Avenue, New Orleans, Louisiana 70113
Telephone 527-6391

December 31, 1969

Re: J. H. Rutter Rex Manufacturing Company, Inc.
Cases Nos. 15-CA-721
15-CA-723

Henry J. Read, Esquire
Montgomery, Barnett, Brown & Read
806 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Dear Mr. Read:

Attached you will find an accounting of the liquidated backpay owing to certain unfair labor practice strikers in the above-captioned cases for losses they suffered from the date of their unconditional offers to return to the date upon which your client made valid offers of reinstatement to them. Interest has been assessed at the rate of 6 percent per annum from June 2, 1964 through January 7, 1969. If payment of the net backpay plus interest shown in the attached document is made to each of the backpay claimants listed on or before January 9, 1969, no further interest will be assessed against the principal amounts.

The payment of the amounts found owing can be effected by drafting checks in favor of those persons whose

names appear on Attachment A, less deductions for Federal and State withholding tax and Social Security and remitting same to this office.

It is our information that four of the backpay claimants are now deceased — namely Leonce Breaud, Gertrude LaRose, and Dorothy Hearson. In drafting checks for those individuals, the checks should be drawn in the name of the estate.

Attachment B lists the names of backpay claimants whose backpay continued after June 24, 1961.[A1] We are aware of the fact that your client offered reinstatement to some of those persons, but ask now that you provide us with an accounting as to the exact date upon which each person listed was offered reinstatement. In the event your client has not as yet offered reinstatement to any of those listed in Attachment B, such action should be taken immediately and this office advised as to the date upon which the offer was made.

If this letter raises questions which require further explanation, kindly advise the undersigned of this fact at your very earliest convenience.

Very truly yours,

s/ JOHN T. LACEY
John T. Lacey
Compliance Officer

[A1]Emphasis Supplied.